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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/524,174	03/03/2006	Frederic Fortin	4DIMSP.007US	2469
90934	7590	12/09/2010		
Monument IP Law Group 1717 Pennsylvania Avenue Suite 900 Washington, DC 20006			EXAMINER FISHER, ELANA BETH	
			ART UNIT 3733	PAPER NUMBER
			NOTIFICATION DATE 12/09/2010	DELIVERY MODE ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

ckim@monumentip.com

Office Action Summary

Application No.

10/524,174

Applicant(s)

FORTIN ET AL.

Examiner

ELANA B. FISHER

Art Unit

3733

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 25 October 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 13-22 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 13-22 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SE/US)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on October 25, 2010 has been entered.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 13-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fortin (WIPO Publication 2000/72768 A1) in view of Alby (U.S. Patent 6,241,730) and Campbell, Jr. (U.S. Patent 5,261,908).

Fortin discloses a device comprising: a first rod member (35) having a first end (38); a second rod member (36) having a second end (39); a mechanical coupler (300) connecting the first rod member to the second rod member and allowing adjustment of the positions of the first rod member and the second rod member such that a distance between the first end of the first rod member and the second end of the second rod member can be controlled to straighten the spine of a patient, wherein at least one of the first rod member (35) and the second rod member (36) is serrated (FIG 14). Additionally, the second end (39) includes a hook member configured to engage a rib (FIG 14).

However Fortin fails to disclose first and second dampening members coupled to the first and second ends (38, 39) of the first and second rod members (35, 36). Alby discloses a device comprising a rod member (4B) having a dampening member (7), with a first end of the dampening member (4Aa) coupled to a first end of the rod member (4Ba) and a second end of the dampening member (4A) configured to be coupled to a first bone structure, wherein the damping member (7) comprises: a rigid cylinder (8); a first elastic member (7A) disposed within the rigid cylinder; and a second elastic member (7A) disposed within the rigid cylinder, wherein the first end of the first rod member (4Ba) includes an enlarged distal portion (11) disposed between the first elastic member and second elastic member (FIG 1). Additionally, the first rod member (4B) can pivot within the first damping member (7; Column 2) to adjust the alignment of the first rod member with respect to a longitudinal axis of the first damping member.

It therefore would have been obvious to one skilled in the art to modify the device taught by Fortin, by having a dampening member attached to the first and second ends (38, 39) of the first and second rod members (35, 36) as is taught by Alby (see FIG 1, 4), because the dampening device provides the advantage of aiding in dampening stresses and strains experienced by vertebrae when they are withstanding compression, extension, and lateral bending that occur during the operation of the device and during bodily movements, when the device is connected to vertebrae and/or the rib cage (Column 1-2). Furthermore, the rigid rods taught by Fortin do not provide means of dampening the stress and strain experienced by the intervertebral discs and bodies; therefore use of the

dampening device taught by Alby in combination with the rigid rods taught by Fortin allows for the problem presented by Fortin to be overcome.

Fortin additionally fails to disclose that at least one of the first and second rod members (35, 36) is curved along its entire length. Campbell, Jr. discloses a distraction device comprising first and second rod members (10) that are configured to be coupled to bony structures such as ribs or vertebrae (FIG 21), similarly to that taught by Fortin. Additionally, Campbell, Jr. discloses that the first and second rods (10) are curved along their entire length and are constructed from a malleable material, such that the curvature can be adjusted (Column 6, lines 44-52). It therefore would have been obvious to one skilled in the art to modify the distraction device taught by Fortin, by having the first and second rods be curved along their entire length, as is taught by Campbell, Jr. because it allows for the rod to conform to the "physiology of the intended recipient" of the device (see Campbell, Jr. - Column 6, lines 44-52).

Response to Arguments

4. Applicant's arguments with respect to claims 13-22 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ELANA B. FISHER whose telephone number is (571)270-3643. The examiner can normally be reached on Monday through Friday from 8:30AM to 5:00PM EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571)272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Elana B Fisher/
Examiner, Art Unit 3733
/EDUARDO C. ROBERT/
Supervisory Patent Examiner, Art Unit 3733